Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STUART AND BEVERLY BAUMGARD,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the Internal Revenue Service retain the amount of an approved and scheduled refund if it subsequently concludes that the taxpayer should have owed more tax, even though no assessment was made before the expiration of the statutes of limitations applying (i) to the period for which the refund was determined, and (ii) to the period to which the refund was applied.

PARTIES TO THE PROCEEDING

There are no parties to this proceeding except those named in the caption of the case. Because plaintiffs (Petitioners) are individuals, the corporate disclosure statement required by Rule 29.6 does not apply.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Stuart and Beverly Baumgard (collectively "Baumgard") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit (the "Court of Appeals") in this case.

OPINIONS BELOW

The opinion of the Court of Federal Claims is reported at *Baumgard v. United States*, 42 Fed. Cl. 301, 98-2 USTC ¶50,888 (1998). (App. A). That opinion was affirmed by the Federal Circuit Court of Appeals by an order without opinion. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on October 6, 1999. The Court of Appeals denied a timely Petition for Rehearing and Suggestion for Hearing in banc on December 14, 1999. (App. C). Mandate was issued December 21, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Rule 29.4(b) and (c) notifications are not applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Internal Revenue Code ("IRC") Section 6402(a)[1] provides in relevant part:

> In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall . . . refund any balance to such person.

IRC Section 6401(a) provides:

> The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

IRC Section 6407 provides:

> The date on which the Secretary first authorizes the scheduling of an overassessment in respect of any internal revenue tax shall be considered as the date of allowance of refund or credit in respect of such tax.

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[1] 26 U.S.C. is cited throughout this Petition as "IRC."

STATEMENT OF THE CASE

Appendix D is an official certification (the "Account Certification") of the payments, credits, and legal assessments for Baumgard's 1984 tax year. That Account Certification shows that an overpayment of $95,290.02 is due to Baumgard based on determinations made October 17, 1988. No entry was made in error and all assessments made for that year are shown on the Account Certification. IRC Section 6402 explicitly states that any overpayment shall be refunded by the IRS, unless applied to another liability of the taxpayer. This case involves nothing more than Baumgard's demand for the amount shown on the Account Certification and due to him under the unambiguous terms of Section 6402.

The lower court held that a statement made by this Court in *Lewis v. Reynolds*, 284 U.S. 281, *modified*, 284 U.S. 599 (1932), can be applied by the Internal Revenue Service as a sword to permit an approved refund to be reversed after the statute of limitations on assessments expires. However, *Lewis v. Reynolds* only permits using a barred adjustment as a shield against a taxpayer's claim that some additional deduction justifies the determination of an overpayment. The lower court's decision is inconsistent with this Court's decisions and stands in stark contrast to decisions by the Fourth, Seventh and Ninth Circuits: *Vishnevsky v. United States*, 581 F.2d 1249 (7th Cir. 1978) (Section 6402 established a "plain and ministerial duty" to pay authorized refunds); *Estate of Michael v. Lullo*, 173 F.3d 503, 513, n.10 (4th Cir. 1999) (IRS conduct similar to this case was "lawless"); *Sokolow v. United States*, 169 F.3d 663, 665 (9th Cir. 1999) ("Congress superseded *Lewis*, by statute").

If the lower court's reading of *Lewis v. Reynolds* were correct, the IRS could retain money due to any taxpayer if the IRS believes that it could have assessed additional taxes against that taxpayer for any closed taxable period. The implications would be extremely broad. Virtually every taxpayer at some time has an established overpayment of tax for some year and the IRS routinely applies such overpayments to other tax liabilities pursuant to the authority granted by Section 6402. By authorizing the IRS to disregard explicit statutory restrictions on assessments, the lower court has granted that agency profound powers that will be used to abuse due process rights of a multitude of taxpayers.

A. Background Of The Approved Refund.

The facts in this case were stipulated. Most of the important facts are clearly shown on the Account Certification for 1984, which sets forth all entries from Baumgard's Individual Master File ("IMF") Transcript (the "Transcript"). (App. D).

1. The IRS Approved And Scheduled The 1984 Refund That Baumgard Is Seeking.

Baumgard's initial 1984 tax return reported a tax liability of $1,728. The IRS repaid Baumgard the amounts he had paid in excess of that liability. On January 5, 1988, Baumgard filed an amended return for 1984 and paid the IRS the sum of $99,913. That amount was entered on Baumgard's Transcript as a payment and as an assessment of tax and interest (i.e., a self assessment based on that amended return) on February 16, 1988.

On February 9, 1988, Baumgard filed a second amended return for 1984. That amended return claimed a refund of tax for 1984 based on an additional deduction. This deduction was a net operating loss ("NOL") carryback under IRC Section 172 based on losses reported on Baumgard's 1986 return and remaining after offsetting 1983 income.[2] That 1984 claim was allowed. Tax and interest for 1984, in the respective amounts of $72,484 and $22,806.02, were abated on October 17, 1988. That fact is the most critical fact in this case. It is stipulated and not challenged. It is clearly shown on the Account Certification. The lower court found that "the IRS scheduled abatements of tax and interest for taxable year 1984 totaling $95,290.02 in October 1988." (App. A at 3).

Thus, as of November 3, 1991, the Transcript for 1984 showed a credit balance of $95,290.02 (exclusive of uncomputed interest). The existence of this credit balance was confirmed in writing by the IRS. Baumgard merely seeks to recover that credit balance (plus statutory interest).

2. Baumgard's Refund Was Held Because Of A Separate TEFRA Audit That Did Not Lead To Any Assessments.

As stipulated in this case, the lower court found that "the IRS did not refund the amount [of the abated tax] because of a hold placed on the account pending an examination of Knox Energy Partners No. 1." (App. A at 3). That examination was made pursuant to the TEFRA

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[2] The 1983 refund received by Baumgard is not in issue.

deficiency procedures set forth in IRC §§ 6221 *et seq.* The need for the suspense account disappeared when the TEFRA matter was resolved by a closing agreement that did not allow any further assessments for 1984. The 1984 year was unchanged. (App. A at 4). Thus, the 1984 overpayment remained.

3. The IRS' Subsequent Audit of 1986 Did Not Result In Any Assessment For 1984.

The IRS (and the lower courts) apparently concluded that certain actions taken for the 1986 year somehow extinguished Baumgard's right to his approved 1984 overpayment. The IRS audited Baumgard's 1986 income tax return and proposed to disallow certain losses claimed for that year. Baumgard signed a waiver of statutory restrictions on assessments (Form 870), allowing assessment of a specific dollar amount ($199,357) for the 1986 year. That waiver did not mention 1984. Neither the revenue agent nor any other IRS representative ever notified Baumgard of any proposed assessment of any tax deficiency for 1984. No waiver of statutory restrictions was signed for 1984. No additional 1984 tax was ever assessed.

The adjustments which led to assessment of tax for 1986 were specifically identified as "unagreed." Baumgard paid the $199,357 and filed a timely refund claim which sought to reverse the 1986 assessments of that amount. After that refund claim was rejected, Baumgard sought a review by the Appellate Division of the IRS. In late 1992 and early 1993, settlement discussions took place with the IRS Appeals Division regarding the 1986

refund claim. During those discussions, both sides knew that 1984 was a closed year and that the Transcript for 1984 showed the credit balance which had arisen out of the abatement of 1984 taxes. The parties also knew that, if Baumgard's 1986 refund claim was rejected, the total carryback deductions claimed by Baumgard for 1983 and 1984 (plus a smaller loss reported in 1992) would equal the net amount Baumgard claimed to have lost in 1986. Thus, an allowance of additional deductions for 1986 would have been a windfall for Baumgard. With that in mind, Baumgard agreed in February of 1993 to drop his claim for refund of the assessed 1986 tax.

Baumgard authorized the assessment of $199,357 for 1986, but nothing more. He never agreed to the imposition of additional tax for 1984. Thus, the 1984 overpayment remained.

4. The IRS Illegally "Dumped" Baumgard's Credit Balance.

When the TEFRA procedures were completed, Baumgard demanded his credit balance and the IRS refused to pay. On or about September 27, 1994, pursuant to a Freedom of Information Act request, Baumgard learned that the IRS had simply dumped his 1984 approved refund. That is, without making an assessment (or observing any of the statutory prerequisites to making an assessment), the IRS transferred this amount to the IRS' own general fund. (App. A at 4).

B. The Proceedings Below.

The parties stipulated to the facts summarized in this Petition and submitted cross motions for summary judgment. The Court of Federal Claims granted the Government's motion and thereby permitted the IRS to simply "dump" Baumgard's 1984 credit balance from his Account Certification. That court's holding did not even mention Sections 6401, 6402 and 6407, the express terms of which should control this case. Instead, the lower court held that the central issue in this case was controlled by this Court's 1932 statement that the United States may "retain payments already received when they do not exceed the amount which might have been properly assessed and demanded." *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932). The lower court did not discuss the context in which *Lewis v. Reynolds* made that statement, nor the implications of the subsequent enactment of Sections 6401, 6402 and 6407 and various assessment rules in the Internal Revenue Code.

The Federal Circuit Court of Appeals affirmed without opinion.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW DEPARTED FROM JUDICIAL STANDARDS SINCE IT IGNORES THE EXPRESS TERMS OF THE GOVERNING STATUTE

This case, like *Baral v. United States*, ___ U.S. ___, 2000 WL 196687 (Feb. 22, 2000), requires nothing more than a reasonable reading of the procedural terms enacted by

Congress as part of the Internal Revenue Code. As in *Baral*, the issues are basic and will affect many taxpayers.

A. The Record Clearly Establishes That Baumgard's 1984 Refund Was Already Approved And Scheduled.

The Internal Revenue Code defines the precise sequence of events that leads to the refund of an assessed tax:

> 1. A "claim for credit or refund" is filed with respect to a "tax alleged to have been erroneously or illegally assessed." *See* IRC §§ 6511(a),(b); 7422. Baumgard filed that claim in February of 1988, seeking to abate taxes that had been assessed.
>
> 2. The "date on which the Secretary first authorizes the scheduling of an overassessment . . . shall be considered as the date of allowance of refund or credit. . . . " IRC § 6407. The overassessment was authorized and in fact scheduled in October of 1988. The decision of the Court of Federal Claims acknowledges that fact. (App. A at 3). (*See* App. D).
>
> 3. Once an overpayment is authorized, the IRS may credit the overpayment against another "liability." If it does not, it has a duty to refund any balance to the taxpayer. IRC § 6402. In 1988, the IRS applied the credit by holding it for potential 1984 TEFRA assessments. When TEFRA proceedings were closed several years later without any additional assessment, the IRS refused to pay the scheduled credit.

No one can or does dispute any of these facts. Baumgard's 1984 overpayment was determined, and a refund or credit

was authorized, in 1988. He is simply demanding that the IRS make the payment required by Section 6402.[3]

B. Express Terms Of The Internal Revenue Code Preclude Further Assessments And Entitle Baumgard To Receive His Established Overpayment.

Various provisions in the current Internal Revenue Code assure that tax will not be imposed without observing fundamental due process. The heart of this protection is the concept of an assessment.[4] Most assessments are unobjectionable since they are based on the taxpayer's own income tax return. Section 6213(b) provides simplified assessment procedures for certain uncontested cases such as correcting clerical errors and assessing amounts that were actually paid as tax. *See Baral v. United States, supra.* Section 6213 also provides simplified procedures for amounts that were "credited or refunded" as a tentative carryback allowance. Those simplified procedures do not apply to this case.

The IRC empowers the IRS to assess additional tax in other situations, but only if specified procedures are followed on a timely basis. Sections 6212 *et seq.* allow taxpayers to dispute such proposed assessments, both in IRS administrative review and in the Tax Court, before

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[3] This case does not present whatever issues might arise if the U.S. brings a civil suit for an erroneous refund. In any event, such an action would be time-barred since Baumgard's refund was credited against potential TEFRA liabilities in 1988.

[4] Note that the IRS Transcript and Account Certification reflect amounts of assessed tax and not underlying facts related to items of income and deduction.

the proposed assessments can take effect. Section 6213 restricts assessment of tax until that opportunity has been afforded to the taxpayer. Section 6501 bars late *assessments*.[5]

Section 6401 explicitly states that an amount assessed after the statute of limitations expires is an "overpayment." Thus, if the IRS had tried to eliminate Baumgard's credit balance by following statutory assessment procedures after the statute expired, Baumgard would have an overpayment under the express terms of Section 6401. The lower court responded to this concern when it stated: "There was no new assessment made by the IRS in this case." (App. A at 9). Apparently the lower court was suggesting that the IRS' untimely imposition of tax on Baumgard did not create an "overpayment" since the IRS *failed* to comply with the due process protection built into tax assessment procedures. That result is simply absurd and cannot possibly be what Congress intended by the language of Section 6401. The result, as well as the lower court's failure to address the governing statutes, so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's supervisory power.

Section 6402 explicitly states that an overpayment shall be refunded unless it is credited against a liability of the taxpayer. Baumgard's 1984 Transcript and the Account Certification clearly show that he had an overpayment for 1984. He is entitled to receive the amount

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[5] By contrast, Section 6502 bars late *collections*.

shown on those records (plus statutory interest). If the lower court believes the IRS may ignore its own official records, Baumgard at least deserved a reasoned explanation of the basis for such a decision.

C. The Lower Court Miscomprehended The Significance Of A Tax "Liability".

The lower court asserted that Baumgard had a tax "liability" or "debt" for 1984 even though no assessment was made. (App. A at 9). This suggests that it is just a waste of time to follow the assessment procedures set forth in the statute.[6]

The lower court's understanding of the significance of a tax "liability" or "debt" is inconsistent with *Estate of Michael v. Lullo*, 173 F.3d 503 (4th Cir. 1999). In that case, the IRS made an obvious error when it assessed estate taxes; it simply failed to include assets actually shown on Schedules B, D and F of the return filed by the taxpayer. The Fourth Circuit held that mandamus applied to preclude the IRS from offsetting credits to correct for this error and stated:

> The dissent incorrectly asserts that we are 'directing the IRS to forgo the assessment and

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[6] An NOL carryback deduction for a taxable year is just like any other deduction for that separate year. *See* 26 U.S.C. §§ 172(a), 441. The IRS simply has an extended period (not forever) to make assessments. 26 U.S.C. § 6501(h). If Baumgard was accorded his statutory right to raise all relevant facts and issues in response to a notice of proposed deficiency (such as tax benefit factors considered in resolving the 1986 year), the purported liability would not have been obvious at all.

> collection of taxes that *all agree are owed by a taxpayer.'*. . . . To the contrary, the Estate does not owe additional taxes, and we therefore *do not* agree that any additional taxes are owed. Had the IRS properly assessed the disputed amount during the limitations period, the Estate may well have owed those taxes. But as the IRS admitted in its June 21, 1994 letter, it did not during the period of limitations, assess taxes on the assets listed on Schedules B, D and F. Consequently, the statute of limitations not only prevents the IRS from assessing these taxes in the future, it *extinguishes* liability for all such time-barred taxes. [citations omitted]. As a result, the taxes in dispute are not now and cannot ever be owed.

Id. 173 F.3d at 507, n.5.

The Fourth Circuit concluded:

> While the dissent also describes our decision as 'unprecedented' and 'remarkable,' it is hardly unprecedented or remarkable for courts to require government agencies to comply with the law. And when government agencies have acted in a lawless manner, it is neither unprecedented nor remarkable for them to be directed to cease and desist from lawless activity.

Id. 173 F.3d at 513, n.10.

In the current case, the lower court erroneously stated: "Plaintiffs do not claim that they overpaid their taxes." (App. A at 7). Baumgard's payments and credits exceeded his assessments and therefore he clearly overpaid his tax. Facts that may or may not have permitted additional timely assessments are not relevant to this case.

II.

THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *LEWIS V. REYNOLDS* AND WITH DECISIONS IN OTHER CIRCUITS.

A. The Lower Court Explicitly Based Its Decision On *Lewis v. Reynolds*.

Section 6402 requires any overpayment to be refunded unless it is applied to another liability. The IRC sets forth procedures that must be followed to make a valid assessment. The central question in this case is whether the IRS can bypass these explicit statutory terms by simply "dumping" a taxpayer's credit balance.

Although that notion appears simply bizarre to Baumgard, the lower court determined that language in *Lewis v. Reynolds* dictates that the IRS may do so. The lower court stated its critical holding as follows:

> Plaintiffs also contend that the IRS lacked authority to eliminate the credit balance from its account. The 'dumping' of the credit into the IRS general fund was arbitrary and capricious and constitutes an assessment that is barred by the applicable statute of limitations, according to plaintiffs.
>
> *Lewis v. Reynolds*, 284 U.S. 281 (1932) controls this argument. . . . Here, plaintiffs claimed a deduction [for 1986] that was subsequently disallowed. The related carryback [to 1984] associated with the loss was not adjusted to reflect the disallowance. The IRS, realizing its mistake kept the credit in satisfaction of plaintiff's debt. The IRS may retain amounts already received to offset a liability without making a new assessment.

> *Lewis*, 284 U.S. at 283. There was no new assessment made by the IRS in this case.

42 Fed. Cl. 301 (1998) (App. A at 8-9).

The lower court concluded that the following passage from *Lewis v. Reynolds* dictated the result in this case (although failing to cite the first sentence):

> An overpayment must appear *before refund is authorized*. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

Id., 284 U.S. 281, 283 (*emphasis added*) (App. A at 9).

The record in the current case definitively establishes that Baumgard's refund was authorized. The question is whether the IRS may arbitrarily nullify that action. The lower court effectively concluded that the expiration of the statute of limitations does not restrict imposition of taxes in that manner but merely cuts off the taxpayer's statutory due process protections.

B. In Fact, Neither *Lewis v. Reynolds* Nor Any Other Decision Of This Court Allows Tax To Be Imposed Without An Assessment.

The detailed procedural terms enacted in the current Internal Revenue Code supersede any contrary implications of *Lewis v. Reynolds*, since that 1932 case involved the income tax law as in effect before the Revenue Act of 1928. *See Sokolow v. United States*, 169 F.3d 663 (9th Cir.

1999). However, the *Lewis v. Reynolds* doctrine, properly applied, comports with the assessment requirements set forth in the current statute. *Lewis* involved a taxpayer's claim that too much tax had actually been assessed because he had originally neglected to claim *a particular deduction*. The court allowed the IRS to resist that tax refund claim by disallowing *another deduction* for the same taxable period. The Court's syllabus to that case clearly shows the intended meaning:

> In acting upon a claim for refund based upon the disallowance of a particular deduction, the Commissioner of Internal Revenue has authority to reaudit the return and to reject the claim on the basis of the disallowance of another deduction even though the statute of limitations prevents him from making an additional assessment for the year involved.

284 U.S. 281.

Even under pre-1928 law, *Lewis* did not allow imposing tax as to any amounts never assessed nor offsetting a properly determined credit by unassessed tax that might have been assessable. The *Lewis* Court expressly stated: "No new assessment can be made, after the bar of the statute has fallen." 284 U.S. at 283. *See also* IRC § 6401. The *Lewis* Court noted that its decision was consistent with *Bonwit Teller & Co. v. United States*, 283 U.S. 258 (1931), which upheld a taxpayer's right to a recovery grounded on a determination that taxes had been overpaid.

Time after time, the Circuit Courts (relying largely on analysis in *Rosenman v. United States*, 323 U.S. 658 (1945)), have ruled that taxpayers are entitled to the return of

amounts deposited with the IRS if no assessment was made during the statutory assessment period. *See, e.g., Clark v. United States*, 63 F.3d 83 (1st Cir. 1995); *Ewing v. United States*, 914 F.2d 499 (4th Cir. 1990); *United States v. Wilkes*, 946 F.2d 1143 (5th Cir. 1991); *O'Bryant v. United States*, 49 F.3d 340 (7th Cir. 1995); *Stanley v. United States*, 140 F.3d 1023 (Fed. Cir. 1998). In *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), the taxpayer actually signed a waiver of restrictions on assessments but the Government failed to provide the notice of deficiency required to actually make the agreed assessment.[7]

The taxpayers' deposits in those cases did not constitute payments of tax and therefore did not give rise to a self assessment. By the same token, the IRS' choice to earmark an agreed credit balance to potential TEFRA assessments in this case obviously did not constitute an assessment of any tax. It is stipulated that Baumgard's determined overpayment was held to provide for potential assessments under the extended statute of limitations applying to TEFRA matters. When that purpose became

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[7] *New York Life Ins. Co. v. United States*, like the current case involved a net operating loss carryback. Unlike the present case, the IRS had proposed a deficiency assessment for the carryback year and simply failed to follow through. *New York Life* did not even claim, as Baumgard did, that it had relied to its detriment on the lack of an assessment in failing to obtain a tax benefit for another year. Yet, the Federal Circuit upheld *New York Life's* recovery of funds deposited for the carryback year, concluding:

> The government can avoid this situation by making a timely assessment of the tax deficiency, which would insure it the right to litigate the merits of the deficiency.

118 F.3d at 1560.

moot (by a TEFRA closing agreement that did not authorize any new assessments), Section 6402 (and the closing agreement) entitled Baumgard to receive the overpaid taxes. The IRS has no more right to take a taxpayer's money when it has unilaterally held a determined overpayment than when the taxpayer made a deposit.

C. The Lower Court's Application Of *Lewis v. Reynolds* Is Contrary To Decisions Reached By The Fourth, Seventh And Ninth Circuits.

This Court must clarify the relationship of *Lewis v. Reynolds* to the current terms of the Internal Revenue Code since the Circuit Courts have reached several different results related to that issue.

Vishnevsky v. United States, supra, involved a situation in which the IRS promised a taxpayer that it would schedule an overassessment. The Seventh Circuit held that Section 6402 mandates the refunding of any determined overpayment, unless it is applied to some other tax liability. In granting mandamus, the Seventh Circuit went considerably beyond the relief demanded by Baumgard since the IRS had never actually scheduled the refund for Vishnevsky.

Sokolow v. United States, supra, and *Estate of Michael v. Lullo, supra,* both involved IRS elimination of credits (for amounts paid and for foreign taxes, respectively) after the expiration of the statute of limitations on assessments. The two decisions are inconsistent with each other, but both of the decisions are inconsistent with the decision reached in the *Baumgard* case.

Sokolow ruled that, in light of the Anti Injunction Act, 26 U.S.C. § 7421, the taxpayer's appropriate remedy was to pay the amount in dispute and then to claim a refund. That Circuit concluded that the refund action would be an adequate remedy since any amount assessed after the expiration of the statute of limitations would constitute an overpayment under the express terms of Section 6401. That court concluded that *Lewis v. Reynolds* would not bar recovery since "Congress superseded *Lewis*, by statute." *Id.* 169 F.3d at 665.

Estate of Michael v. Lullo, supra, involved an obvious failure by the IRS to include certain acknowledged assets in computing estate tax. Apparently believing that procedures must give way to some notion of a taxpayer's "real tax liability," the IRS eliminated credits from the Estate's transcript. The Fourth Circuit, clearly alarmed by that "lawless" approach, granted mandamus to restore the credits. In so ruling, that court analyzed *Lewis v. Reynolds* in detail and concluded that the IRS' elimination of the taxpayer's credit could not be supported by any reading of that case and the law. Accordingly, it held that the Anti Injunction Act did not apply.

III.

PARTS OF THE LOWER COURT'S DECISION OBSCURE THE CORE ISSUE IN THIS CASE.

A. It Is Not Necessary To Consider "Account Stated" Caselaw.

The lower court ignored the controlling statutes and misread *Lewis v. Reynolds*. As a result of these errors, the

lower court found it necessary to devote substantial attention to an alternative ground for recovery – the fact that the IRS contractually agreed to pay (or credit) certain sums to Baumgard. That part of the opinion involves factual matters and arcane legal principles that have no bearing on this Petition.

B. The Fact That Prior 1984 Taxes Were Abated Is Not In Doubt.

The lower court stated that any contractual agreement by the IRS to pay a sum to Baumgard was "provisional and tentative." However, the Account Certification clearly shows that previous assessments for 1984 were in fact abated. *See* IRC § 6407. The parties stipulated that such assessments were abated. The court could not, and did not, deny that 1984 tax assessments had been abated and that Baumgard had a credit balance of $95,290.02 for 1984. Under Section 6402, a scheduled abatement is not provisional or tentative, even though the IRS may use its discretion to apply the credit to some other liability before refunding the balance.

C. The Lower Court Miscomprehended How TEFRA Relates To This Case.

TEFRA applies a different limitations period to certain partnership items. Thus, two separate limitations periods applied to Baumgard's 1984 tax year. The implications are no different from considering two separate years. The ability to offset credit balances held for an open TEFRA period by unassessed taxes from a closed

non-TEFRA period would eradicate the separate statutes of limitations under TEFRA and simply extend the statute of limitations for any assessment arising for a year that happened to include a TEFRA matter. Congress clearly stated (apparently with *Lewis v. Reynolds* in mind) that such an offset is impermissible:

> The separate statute of limitations applicable to non-partnership items of a partner may have expired when the computational adjustments of a partner's tax liability attributable to a FPAA or final court decision is made. In such a case neither the Secretary (to reduce a refund) nor a partner (to reduce an assessment) may raise non-partnership items in determining the partner's tax liability resulting from such computational adjustments.

H.R. Conf. Rep. No. 760 to P.L. 97-248, 97th Cong. 2d Sess. 409, 611, *reprinted in* 1982-2 C.B. 668. This statement reflects the broader rule that a current overpayment credit cannot be offset by a barred assessment from another year.

Although the credit now claimed by Baumgard arose from non-TEFRA matters, the parties here stipulated that the credit was held to cover potential TEFRA assessments. But for the TEFRA audit, Baumgard would have received his approved refund several years earlier. This is no different from transferring a 1986 refund to cover potential 1990 assessments and deciding many years later that the 1986 refund should be reconsidered. In either case, fungible credits are being held under a particular open statute of limitations. The credit may not be offset by an unassessed tax for a closed period.

IV.

THE STATUTE AND THIS COURT'S PRECEDENTS PERMIT A TAXPAYER TO SUE TO RECOVER LIQUIDATED AMOUNTS DUE TO HIM

Section 6402 specifically states that, in the case of an overpayment, the IRS may credit the overpayment against other tax liabilities and "shall . . . refund any balance to such person." Because the taxpayer's rights under Section 6402 are so clear, at least two courts have held that mandamus is appropriate in this situation. In *Vishnevsky v. United States*, 581 F.2d 1249 (7th Cir. 1978), the Seventh Circuit held that a "refund or credit" was allowed when the IRS assured the taxpayer that it *would be* scheduled under Section 6402. As a result, the IRS had "a plain and ministerial duty to give taxpayers the benefit of their *determined overpayment*." 581 F.2d at 1254 (*emphasis added*). That court held that the result was compelled by the explicit terms of IRC Sections 6402 and 6407. *See also Estate of Michael v. Lullo, supra.*

Mandamus is an extraordinary remedy and should not be required where a simple legal action is available. The Tucker Act grants the Court of Federal Claims jurisdiction over actions founded on any Act of Congress, upon any express or implied contract, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. § 1491. Baumgard's complaint was sufficient to notify the United States of his claim. Cf. *Bonwit Teller & Co. v. United States*, 283 U.S. 258 (1931).[8]

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[8] *New York Life Ins. Co., supra*, invoked Tucker Act jurisdiction (as Baumgard did in this case). In each case, the plaintiff's claim asserted that the value sued for was improperly

The IRS and the lower court would limit Baumgard to a new refund claim. This ignores the fact that a refund claim had been made and had been granted. It is an erroneous assessment that gives rise to a claim for refund. *See Rosenman v. United States, supra,* 323 U.S. at 661. Baumgard had no reason to file a second administrative refund claim with the IRS because there was no tax assessment to protest.[9] Such a refund claim could only lead to a ministerial charade, since Baumgard's credits clearly exceed timely assessed taxes. Instead, Baumgard sent letters to the IRS demanding his overpayment. Those letters exhausted any available administrative remedies.

The gist of Baumgard's claim has always been clear. The IRS has Baumgard's funds in its possession without an assessment. The amount is quantified on the Transcript and Section 6402 unequivocally requires the IRS to pay those funds to Baumgard. Baumgard did not call his lawsuit a "civil action for refund" since refund actions deal with the facts underlying an erroneous assessment. Congress certainly did not intend for a taxpayer to be without a remedy when the IRS illegally appropriates tax credits.[10]

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exacted in contravention of a statute. As held in *New York Life,* the Court of Federal Claims has jurisdiction to hear such a claim.

[9] A refund claim must be filed on Form 1040X (an amended return) or Form 843 (a Claim for Refund and Request for Abatement). Those forms do not apply. Baumgard was not amending his return and had no unabated taxes for 1984.

[10] Complaints should be interpreted so as to do substantial justice. Federal Rules of Civil Procedure, Rule 8(f). In *United*

CONCLUSION

This case presents a simple question. If the IRS happens to hold funds belonging to the taxpayer, can it disregard the tax assessment procedures that Congress carefully spelled out in the Internal Revenue Code? The lower court ignored the statutory terms and ruled that a phrase used by this Court in *Lewis v. Reynolds* gives the IRS that power. *Lewis v. Reynolds* said no such thing. The Internal Revenue Code (in 1928 and today) does not permit tax to be imposed unless tax has been assessed in accordance with the due process rules enacted in the statute. The IRS' appropriation of Baumgard's funds was "lawless" and abusive. *See Estate of Michael v. Lullo, supra.*

The doctrine established by the lower court in this case has an alarmingly broad reach. Virtually every taxpayer will have a credit balance at some time, either because wage withholding or estimated tax payments exceed tax assessments or because an amended return reflects a newly realized deduction. The IRS routinely transfers such credits from one period to another pursuant to Section 6402. The lower court's ruling would allow the IRS to keep such credit balances, simply because it believed it neglected to access tax for some

---

States v. Williams, 514 U.S. 527 (1995), the United States argued that a citizen had no remedy to recover amounts she had paid which related to taxes owing by a third party but not by that citizen. This Court rejected that argument on the grounds that "we do not believe Congress intended to leave parties in respondent's position without a remedy." *Id.* at 529.

period, without even notifying the taxpayer and irrespective of statutes of limitations. This Court must act in this case to protect the integrity of our tax laws.

Accordingly, petitioners Stuart and Beverly Baumgard respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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STRAIN & ROSENBERGER
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Telephone: (562) 436-2900
Attorneys for Petitioners

APPENDIX A

In the United States Court of Federal Claims

No. 95-169 T
(Filed: November 13, 1998)

STUART AND BEVERLY BAUMGARD *Plaintiffs,* v. THE UNITED STATES, *Defendant.*	Account Stated; Implied-in-Fact Contract; IRS Statement of Change to Account.

John A. Strain, Strain & Rosenberger, Long Beach, California, for plaintiffs.

Ellen C. Specker, United States Department of Justice, Washington, D.C., for defendant.

OPINION AND ORDER

HODGES, Judge.

This case is before the court on cross motions for summary judgment. Plaintiffs claim entitlement to $95,290.02 for an overpayment of tax. The alleged overpayment arose from a 1986 net operating loss that plaintiffs used as a deduction

for the 1983 and 1984 tax years.[1] Plaintiffs present this claim not as a tax refund suit but as a contract claim. Defendant contends that when the IRS disallowed the loss for 1986, the auditing agent failed to disallow the 1984 carryback amount which arose from the loss. Thus, plaintiffs' account erroneously showed a credit balance. Once the mistake was discovered, the IRS transferred the credit to its general fund and informed plaintiffs that they were not entitled to a refund. Because plaintiff cannot show the existence of a contract with the United States, we grant defendant's motion for summary judgment.

BACKGROUND

Plaintiffs reported a net operating loss of $896,466 for the 1986 taxable year. The loss was related to car racing. Of that, $815,000 was described as a "loss from investment in [a] related business." Plaintiffs amended their 1983 and 1984 returns in 1988 to carryback the $815,000 loss to those tax years, resulting in an overpayment of taxes for those years. Plaintiffs determined they overpaid $97,421 in taxes in 1983 and $72,484 in 1984. The IRS refunded $104,281.70 to plaintiffs in June 1988 for the 1983 taxable year.[2] Plaintiffs amended their 1986 return in July 1988, before receiving word about the 1984 tax year. They eliminated the $815,000 deduction and claimed instead a casualty/theft loss of $770,441.

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[1] This deduction is referred to as a carryback. I.R.C. § 172(b)(1)(A) permits a taxpayer to carryback a net operating loss to each of the three years preceding the taxable year of such loss.

[2] This represents tax of $97,421 and interest of $6,860.70.

The IRS scheduled abatements of tax and interest for taxable year 1984 totaling $95,290.02 in October 1988.[3] The notice entitled "Statement of Change to Your Account" stated in part:

> Amount to be refunded to you if you owe no other obligations [is] $95,290.02 [.] You may have already received this check. If not, please allow 2 weeks for it to be mailed to you. Any interest due you will be added to your refund.

The IRS agent who conducted the audit of the 1986 tax year informed plaintiffs that he was considering disallowing the 1986 loss of $815,000 (subsequently recharacterized as a casualty/theft loss) on the grounds that plaintiffs had a reasonable prospect of recovery and failed to substantiate the loss was due to theft. The IRS did not refund the amount because of a hold placed on the account pending an examination of Knox Energy Partners No. 1.[4]

Plaintiff was informed in February 1990 that the IRS was disallowing the 1986 casualty/theft loss on the amended return filed in 1988. In October 1991 plaintiffs requested a transcript of the 1984 taxable year, which reflected a credit balance of $95,290.02. Plaintiffs inquired as to the status of the 1984 credit balance. In January 1992, a tax technician from the IRS stated that the credits would remain on the account until the resolution of Knox Energy Partners No. 1.

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[3] This represents tax of $72,484 and interest of $22,806.02.

[4] Knox Energy Partners No. 1 is one of plaintiffs' investments of which the IRS was conducting an audit.

The Knox Energy audit was settled in July 1992. The IRS computed the effect of the settlement on the 1984 taxable year in December 1992. The 1984 year was unchanged. Soon thereafter, the 1984 carryback amount, stemming from the 1986 return was disallowed. The IRS transferred the $95,290.02 credit to its general fund. Plaintiffs received a letter from the IRS in March 1993 explaining the reasons for the disallowance. It stated in part:

> As you are probably aware, when the audit of 1986 was done, the agent failed to follow through on the audit and eliminate the carrybacks to 1983 and 1984.
>
> [T]he credit from the 1984 1040X allowing the NOL carryback from 1986 [was] never refunded. Because this amount was not allowable and because by mistake it didn't refund, we will not refund it. The taxpayer is not entitled to it, and had it been done properly, the taxpayer would owe interest on it. Of course because we are barred from assessing it, we can't assess interest on it.

All questions regarding credits were referred to the IRS's Problems Resoultion [sic] Officer. Plaintiffs demanded payment for the 1984 credit from the Problems Resolution Office in March 1994. The IRS responded by stating that claims for a refund for 1985, 1986, and 1987 were closed and plaintiffs would not be receiving an official notice of disallowance because they had executed Form 2297.[5] Plaintiffs filed suit in March 1995.

---

[5] Form 2297 authorizes a waiver of statutory notification of claim disallowance.

DISCUSSION

Plaintiffs contend that the United States must pay them the amount that it determined to be an overpayment for 1984. The 1984 credit balance of $95,290.02 constituted an "account stated" at the time that it was scheduled and therefore must be refunded, according to plaintiffs.

Account stated recovery is premised on implied contract theory. It permits recovery "when a debtor (the Service) submits to a creditor (the taxpayer) a statement of the final balance due on an account and the creditor agrees to accept the proposed balance to close the account." *West Publishing Co. Employees' Preferred Stock Assn. v. United States,* 198 Ct. Cl. 668, 675 (1972). A contract is created when the Government "agree[s] with the taxpayer that he has overpaid his taxes in a definite amount, and . . . communicated to him its intention to repay." *Id.*

Plaintiffs assert that the United States agreed that they had overpaid their taxes for 1984. The recording of a credit in a specific dollar amount, and their receipt of an October 1988 "Statement of Change to your Account" created an implied-in-fact contract with the United States. The October letter stated that the amount to be refunded to plaintiffs if they owed no other obligations was $95,290.02. The transcript plaintiffs received listed $72,484 as abatement of prior tax and $22,806.02 as abatement of interest assessed.

The IRS subsequently discovered during an audit of the 1984 year that upon disallowance of the 1986 loss

claimed by plaintiffs, it had failed to go back and disallow the associated loss carryback for the 1983 and 1984 years. It had already remitted payment for the 1983 year to plaintiffs. The $95,290.02 credit attributable to the 1984 tax year had not been refunded to plaintiffs when the IRS discovered its mistake. Thereafter, it was placed in the IRS General Fund and kept in satisfaction of taxes owed by plaintiffs.

The "Statement of Change to Your Account" sent to plaintiffs in October 1988 was an IRS form letter that provided the amount to be refunded "if you owe no other obligations." An account stated arises only after the IRS "[has] the chance to pass on the [taxpayer's] claim and has made a definite decision in its favor." *West Publishing Co. Employees' Preferred Stock Assn.*, 198 Ct. Cl. at 676. The qualifying language in the letter shows that the amount was not a determined sum. The IRS had not made a definite decision in plaintiffs' favor. Plaintiffs were aware that the credit would be held pending resolution of Knox Energy Partners No. 1.[6] They also knew that the IRS agent conducting the audit of 1986 was considering disallowance of the 1986 loss. The final sum of the refund, if any, was uncertain. Where the statement of account is "provisional and tentative" there was no agreement as to the credits. *R.H. Stearns Co. v. United States*, 291 U.S. 54, 66 (1934).

Under an implied-in-fact contract theory, plaintiffs must show mutuality of intent to contract, consideration,

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[6] While the decision not to refund the credit from 1984 was not due to the Knox Energy audit, the fact that refund was uncertain defeats an implied-in-fact contract.

and lack of ambiguity in offer and acceptance. *City of Cincinnati v. United States*, 153 F.3d 1375 (Fed. Cir. 1998). They must show authority to contract on the part of the Government agent with whom they dealt. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

Plaintiffs do not claim that they overpaid their taxes. They stipulate that when the 1986 loss was disallowed, the related carryback for the 1984 year was not adjusted to recognize the disallowance. A contract cannot be created when the entire basis for it, that being an overpayment by plaintiff, never occurred. The transaction lacks consideration. The parties did not bargain.

Plaintiffs did not accept the alleged offer. They received a notice from the IRS informing them of a change to their account, and they were aware that adjustments to the account could be made. Plaintiff must show that "a balance was struck in such circumstances as to import a promise of payment on the one side and acceptance on the other." *A.S. Kreider Co. v. United States*, 313 U.S. 443, 448 (1941) (citing *R.H. Stearns Co.* 291 U.S. at 65.) Plaintiffs cannot show that they changed position in reliance on the letter. As the court in *Brooks-Scanlon Corporation* stated:

> A statement of an overassessment appearing in a taxpayer's account certified by the Commissioner does not constitute a promise to pay the amount thereof unless the account as a whole shows that the overassessment is due and owing to the taxpayer and that he and the representative of the Government have agreed upon the debts and credits as set out therein, in which event the certificate becomes an account stated.

Brooks-Scanlon Corp. v. United States, 31 F.Supp. 151, 153 (1940). Plaintiffs have not made such a showing. The Government did not promise that the money would be refunded and plaintiff did not accept defendant's "offer" in any event. A refund always depended on plaintiffs not owing taxes.

Plaintiffs cite *Bonwit Teller & Co. v. United States*, 283 U.S. 258 (1931). The question in Bonwit was whether the taxpayer's suit was barred by the statute of limitations. The Court allowed recovery, stating that the action was not for the overpayment of tax but based "upon the determination evidenced by the certificate issued by the Commissioner. . . . " *Id.* at 265. When plaintiff received the certificate, a cause of action arose regardless of the statute of limitations on refund actions set out in I.R.C. § 6511.

The question here is whether the IRS unequivocally offered to pay plaintiff a determined sum of money. *Bonwit* stands for the proposition that a contract with the Government for a remittance of taxes could exist, irrespective of the statute of limitations on refund suits. The statute of limitations on a refund action here has not expired. *Bonwit* provides another remedy for taxpayers if the elements of an "account stated" are present. It does not hold that taxpayers are entitled to a judgment in their favor in these circumstances.

Plaintiffs also contend that the IRS lacked authority to eliminate the credit balance from its account. The "dumping" of the credit into the IRS general fund was arbitrary and capricious and constitutes an assessment

that is barred by the applicable statute of limitations, according to plaintiffs.

Lewis v. Reynolds, 284 U.S. 281 (1932) controls this argument. In Lewis, the administrator of an estate filed a refund action claiming there had been a wrongful assessment of tax. Plaintiff claimed several deductions on the estate's return. The Commissioner disallowed all deductions claimed, but allowed the deduction for attorney's fees. A deficiency was assessed and paid. Plaintiff commenced a refund action. After auditing plaintiff's return, the Commissioner determined that the deduction for attorney's fees had been improperly allowed. A revised computation was made wherein plaintiff owed additional taxes. The Court affirmed the lower court's holding and stated:

> Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded. *Id.* at 283.

Here, plaintiffs claimed a deduction that was subsequently disallowed. The related carryback associated with the loss was not adjusted to reflect the disallowance. The IRS, realizing its mistake kept the credit in satisfaction of plaintiff's debt. The IRS may retain amounts already received to offset a liability without making a new assessment. *Lewis,* 284 U.S. at 283. There was no new assessment made by the IRS in this case.

CONCLUSION

Plaintiffs presented their claim not as a tax refund case but as a contract case. Account stated is a contract theory, subject to normal rules of Government contract law. Defendant argues that no one with appropriate authority to bind the United States signed an agreement that plaintiffs' refund would be paid. We do not reach that issue because the United States did not issue plaintiffs a promise to pay to start with. The document on which plaintiffs rely is a notice stating that they would receive a refund "if you owe no other obligations. . . . " This is not an unequivocal promise to pay. If it were, plaintiffs cannot show that they accepted the "offer" or that they changed position in reliance thereon.

Because plaintiffs are basing their claim in contract, we do not address the facts that serve as a basis for their claim for refund. Defendant's motion for summary judgment is GRANTED. The Clerk will dismiss plaintiffs' complaint. No costs.

/s/ Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

APPENDIX B

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

99-5036

STUART BAUMGARD and BEVERLY BAUMGARD,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

(Filed Oct. 06, 1999)

ON APPEAL from the U.S. COURT OF FEDERAL CLAIMS
in CASE NO(S). 95-CV-169
This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

Per curiam (PLAGER, SCHALL, and GAJARSA, *Circuit Judges*).
See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED OCT 06 1999

/s/ Jan Horbaly/BG
Jan Horbaly, Clerk

ISSUED AS A MANDATE: DECEMBER 21, 1999

APPENDIX C

United States Court of Appeals
for the Federal Circuit

ORDER

(Filed Dec. 14, 1999)

A combined petition for rehearing and suggestion for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on December 21, 1999.

FOR THE COURT,

/s/ Jan Horbaly(AV)
Jan Horbaly
Clerk

Dated: December 14, 1999

cc: John A. Strain
Kenneth L. Greene

BAUMGARD V US, 99-5036
(CFC - 95-CV-169)

****

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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APPENDIX D

[SEAL]

United States of America

Department of the Treasury

Internal Revenue Service

Date: April 25, 1995

CERTIFICATE OF OFFICIAL RECORD

I certify that the annexed: Certificate of Assessments and Payments, is true for Stuart and Beverly J. Baumgard, 8737 Beverly Boulevard 303, Los Angeles, California, Social Security Numbers: 204-38-8726 and 076-30-2825 respectively, covering Individual Income Tax for the period ending December 31, 1984 under the custody of this office.

[SEAL]

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

/s/ Theron C. Polivka
Theron C. Polivka
Director, Fresno Service Center

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

STUART & BEVERLY J. BAUMGARD
8737 BEVERLY BLVD. 303
LOS ANGELES, CA

EIN/SSN: 204-38-8726
(Spouse) 076-30-2825

Date Rec'd	Explanation/ Locator Number	Assessments (Abatement)	Credits (Reversal)	Assessment Date
Type of Tax: U. S. INDIVIDUAL INCOME TAX RETURN				
Period Ending: 12/31/84				
05/07/85	Return filed and tax assessed	1,278.00	0.00	06/10/85
05/07/85	Withholding credit	0.00	38,115.00	
06/10/85	Refund issued	0.00	(36,837.00)	
10/02/85	Extension of time filed, granted to 08-15-85			
01/05/88	Payment	0.00	76,274.00	
01/05/88	Designated payment of interest	0.00	23,639.00	
	Additional tax assessed	76,274.00	0.00	02/16/88
	Delinquency penalty	7,627.40	0.00	
	Interest	23,790.55	0.00	
02/16/88	First notice issued			
03/28/88	Delinquency referred to District			
	Interest	2,175.15	0.00	06/20/88
06/20/88	Credit applied from period ending 12-31-83 allowed from 02-16-88	0.00	7,778.95	
06/20/88	Credit applied from period ending 12-31-83	0.00	2,175.15	
10/17/88	Audit deficiency tax abated	(72,484.00)	0.00	
10/17/88	Interest abated	(22,806.02)	0.00	

Continued on next page

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BEST AVAILABLE COPY

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

STUART & BEVERLY J. BAUMGARD
8737 BEVERLY BLVD. 303

EIN/SSN: 204-38-8726
(Spouse) 076-30-2825

Date Rec'd	Explanation/ Locator Number	Assessments (Abatement)	Credits (Reversal)	Assessment Date
(Continued: 12/31/84)				
07/15/91	Interest abated	(98.16)	0.00	
	Interest	98.16	0.00	09/09/91
02/08/93	Interest abated	(98.16)	0.00	
04/05/93	Credit transferred to Miscellaneous Funds Account, allowed from 02-16-88	0.00	(7,778.95)	
04/05/93	Credit transferred to Miscellaneous Funds Account, allowed from 06-20-88	0.00	(2,175.15)	
04/12/93	Credit transferred to Miscellaneous Funds Account, allowed from 01-05-88	0.00	(85,335.92)	
04/19/93	Transfer credit to period ending 12-31-82 allowed from 06-20-88	0.00	(8.16)	
04/19/93	Interest due on overpayment	0.00	53.57	
04/19/93	Transfer credit interest to period ending 12-31-82	0.00	(53.57)	

Account Balance:	$0.00
Accrued Interest:	0.00
Accrued Penalty:	0.00
Total Balance:	$0.00
Adjusted Gross Income:	8,047.00
Taxable Income:	0.00

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified, is a true and complete transcript for the period stated, of all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payments relating thereto as disclosed by the records of this office as of the date of this certification.

Signature of Director, Theron C. Polivka
(required for certification):

Location: IRS, Western Region
Fresno, CA

Mildred D. Byrd
Chief, Accounting Branch

April 25, 1995
Date

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BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
APR 5

(2)

No. 99-1499

In the Supreme Court of the United States

STUART AND BEVERLY BAUMGARD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
PAULA M. JUNGHANS
Acting Assistant Attorney General
RICHARD FARBER
KENNETH L. GREENE
Attorneys
Department of Justice
Washington, D. C. 20530-0001
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12pp

QUESTION PRESENTED

Whether, on the facts of this case, petitioners are entitled to a refund of federal income taxes that they paid for their 1984 tax year when they did not make an overpayment of their taxes for that year.

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In the Supreme Court of the United States

No. 99-1499

STUART AND BEVERLY BAUMGARD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 11) is not reported. The opinion of the Court of Federal Claims (Pet. App. 1-10) is reported at 42 Fed. Cl. 301.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1999. The petition for rehearing was denied on December 14, 1999 (Pet. App. 12-13). The petition for a writ of certiorari was filed on March 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On their original 1984 federal income tax return, petitioners reported a tax due of $1,278. That amount was assessed by the Internal Revenue Service and paid by petitioners (C.A. App. 68). Petitioners later filed an amended federal income tax return for 1984, on which they reported an additional tax liability of $76,274. That amount, along with interest of $23,639, was assessed by the Service and paid by petitioners (*ibid.*).

On an amended 1986 federal income tax return, petitioners claimed a theft loss deduction of $815,000 with respect to their investment in an automobile dealership (Pet. App. 2). The theft loss claimed by petitioners resulted in a net operating loss for them for 1986. Petitioners then filed a second amended return for 1984 on which they carried back a portion of the 1986 net operating loss. This resulted in a claim for refund of $72,484 for 1984 (*ibid.*).

In October 1988, petitioners were sent a notice by the Service which stated that the "[a]mount to be refunded to you if you owe no other obligations [is] $95,290.02" (Pet. App. 3).[1] This amount was not actually refunded to petitioners, however, due to an ongoing audit of a partnership in which petitioners had an interest (*ibid.*).

During this same period of time, the Internal Revenue Service informed petitioners that it was considering disallowing the theft loss claimed for 1986 "on the grounds that [petitioners] had a reasonable prospect of recovery and failed to substantiate the loss was due to theft" (Pet. App. 3). When petitioners were thereafter informed that the 1986 theft loss was in fact disallowed (*ibid.*), they paid the resulting deficiency for 1986 and

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[1] That amount consisted of $72,484 in tax and $22,806.02 in interest with respect to petitioners' 1984 taxable year (Pet. App. 3).

filed a claim for refund of that tax, which the Service denied. Petitioners did not thereafter file a refund suit concerning the 1986 tax year, and the disallowance of the claimed loss for that year thus became final (C.A. App. 40-46, 50, 278).

The Internal Revenue Service, however, made no adjustment to its records for petitioners' 1984 account to reflect that the carryback of the 1986 loss had been disallowed. Instead, the agency's records continued to show a tentative credit balance in favor of petitioners for the 1984 year (Pet. App. 2-3). When the partnership matter was finally resolved, with no effect on petitioners' 1984 tax year, petitioners requested a refund of the tentative $95,290.02 credit balance for that year. The Service refused to make the refund: since there was no 1986 loss to carry back to 1984, petitioners were not entitled to a refund for 1984 (*id.* at 4).

2. Petitioners then filed this suit against the United States in the Court of Federal Claims, asserting that they were entitled to recover damages upon an "account stated." The court held that the October 1988, statement that petitioners received from the Service did not constitute an "account stated" because it was, by its very terms, provisional and tentative (Pet. App. 6). The court noted, moreover, that petitioners "do not claim that they overpaid their taxes" for 1984 and that the basis for any claim of an "account stated" thus simply did not exist (*id.* at 7).

The court rejected petitioner's reliance on the decision of this Court in *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258 (1931), which "stands for the proposition that a contract with the Government for a remittance of taxes could exist, irrespective of the statute of limitations on refund suits" (Pet. App. 8). The court explained that *Bonwit Teller* has no applica-

tion when, as here, no contract was made by the government to remit any funds to petitioners (Pet App. 8).

The court also rejected petitioners' argument that, because the government had tentatively proposed to abate the original assessment of the 1984 taxes, (i) the Service should be required to make a new assessment of the $95,290.02 to retain the money paid by petitioners for that year and (ii) such a new assessment would now be barred by the applicable statute of limitations. The court noted that, even if an abatement occurred, petitioners' contentions would fail under *Lewis* v. *Reynolds*, 284 U.S. 281 (1932), which held that a taxpayer must establish that he has overpaid his taxes in order to obtain a refund of them and that, when the taxpayer fails to do so, the government may retain payments of amounts that might have been (but were not) timely assessed (Pet. App. 8-9).

3. The court of appeals affirmed per curiam without opinion (Pet. App. 11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other appellate court. Further review is therefore not warranted.

1. In the trial court, petitioners "presented their claim not as a tax refund case but as a contract case" (Pet. App. 10). Petitioners now assert, however, that they are "simply demanding that the IRS make the payment required by Section 6402" (Pet. 10). That statute authorizes the government to make a refund "of any overpayment." 26 U.S.C. 6402(a). Petitioners may not properly raise here a "refund" claim that they did not present to the trial court.

On the merits, the obvious flaw in petitioners' claim for a refund for their 1984 taxes is that they made no "overpayment" of taxes for that year. As this Court has stated, an overpayment is a "payment in excess of that which is properly due." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 531 (1947). Although petitioners' account did tentatively show a credit balance when a part of the 1984 assessment was abated due to the carryback of the claimed loss from 1986, the Service subsequently determined that the claimed 1986 loss was not allowable. Petitioners could have contested that determination in court but declined to do so. The Service's determination that the loss is not allowable is therefore now conclusive. And, since there was no valid loss from 1986 to carry back to 1984, the amount of taxes paid by petitioners for 1984 was correct and there is thus no "overpayment" of taxes for 1984 to be refunded under Section 6402.

2. To obtain a refund of taxes paid, the taxpayer must establish an actual overpayment of tax, not simply the absence of an assessment. As this Court explained in *Lewis* v. *Reynolds*, 284 U.S. at 283:

> While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied. An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

Since petitioners did not, in fact, overpay their 1984 taxes, the government properly refused to make any refund to petitioners even if an "assessment" of the amount already paid would no longer be timely. See *Lewis* v. *Reynolds*, 284 U.S. at 283; *Moran* v. *United States*, 63 F.3d 663, 666 (7th Cir. 1995) ("As our earlier discussion of *Lewis* implies, the Morans are not entitled to a refund because they did not overpay their taxes, and the lack of a timely assessment does not change that fact."); *Ewing* v. *United States*, 914 F.2d 499, 502-504 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991).

3. Petitioners err in asserting (Pet. 12, 19) that the decision in this case is inconsistent with the decision in *Estate of Michael* v. *Lullo*, 173 F.3d 503 (4th Cir. 1999). That case did not concern a taxpayer's attempt to recover an alleged overpayment of taxes. In that case, pursuant to a closing letter, the Service agreed with the taxpayer that a certain amount of estate tax was due. The Service then assessed the agreed-upon amount, and the taxpayer satisfied its obligation largely through the use of a foreign tax credit. At that point, no tax was due to the government and no refund was due to the taxpayer. After the period provided for by the statute of limitations on assessments thereafter expired, however, the Service determined that there were additional assets of the estate that should have been considered in determining the tax due. It was then too late to assess any deficiency. The Service, however, did not need to assert a deficiency because it believed that the amount of the foreign tax credit should not be applied in full against the liability of the estate. In a mandamus action, the court of appeals concluded that the taxpayer was entitled to obtain the full foreign tax credit. In the course of that decision, the court stated that the doctrine of *Lewis* v. *Reynolds* created a shield for the

government that allowed it to retain payments already made—and did not create a sword that allowed the government to demand payment of amounts not yet received. 173 F.3d at 508. That reasoning is, of course, consistent with the decision in this case: the courts below applied *Lewis* v. *Reynolds* in precisely that manner to allow the government to retain payments already made without regard to whether "assessment" of those amounts could still be made (Pet. App. 9 (citing *Lewis* v. *Reynolds*, 284 U.S. at 283)).

Petitioners also err in asserting (Pet. 18) that the decision in this case is inconsistent with *Vishnevsky* v. *United States*, 581 F.2d 1249 (7th Cir. 1978). In *Vishnevsky*, it was undisputed that the taxpayers had, in fact, overpaid their taxes. Indeed, the court expressly noted that "[t]he fact and amount of overpayment have been determined by the I.R.S., and no suggestion is made that the determination was in any way irregular or inaccurate." *Id.* at 1254. The government had not refused to make the refund in *Vishnevsky* on the ground that an overpayment had not been made; instead, the government contended that the taxpayer failed to file a timely claim for refund. *Ibid.* That case thus presented a different legal question from the one at issue here. The court in *Vishnevsky* determined that, "in the unique circumstances" of that case, the timely claim requirement had been satisfied by correspondence between the Service and the taxpayer indicating a final allowance of the refund claim (*ibid.*). That factual determination in *Vishnevsky* has no application, even by analogy, to the different facts of this case,

which involves a "provisional and tentative," not a final, administrative calculation of liability (Pet. App. 6).[2]

Finally, petitioners are incorrect in asserting (Pet. 3, 18-19) that the decision in this case conflicts with *Sokolow* v. *United States*, 169 F.3d 663 (9th Cir. 1999). In *Sokolow*, when the taxpayer filed a separate return, his account was mistakenly credited by the Service with a payment made by his wife. When this mistake was discovered, the Service removed the credit from the taxpayer's account to correct the resulting liability. The taxpayer, however, claimed that the statute of limitations on making a new assessment had expired by that time and sought an injunction to bar the Service from collecting this liability. The court of appeals held that the taxpayer's action was barred by the Anti-Injunction Act (26 U.S.C. 7421). The court rejected the contention that the taxpayer had no adequate remedy at law, for the taxpayer could pay the tax and sue for a refund. 169 F.3d at 665. In so holding, the court of appeals noted that Congress has now provided by statute that any tax paid after collection is barred by the statute of limitations is to be considered an overpayment. *Ibid.* (citing 26 U.S.C. 6401(a)). In the present case, however, the taxes were paid *before* the period for collection expired and thus no "overpayment" was made for which a refund is allowed. See *Ewing* v. *United States*, 914 F.2d at 502-504.

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[2] Petitioners' citation (Pet. 16-17) to *Rosenman* v. *United States*, 323 U.S. 658 (1945), and related cases is similarly inapposite. Those cases involved disputes as to whether amounts remitted to the IRS were remitted as payments of tax or as deposits. See *Baral* v. *United States*, 120 S. Ct. 1006 (2000). In the present case, it is undisputed that the amounts at issue were remitted to the government as payments of tax.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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